

Message Text

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43

ACTION L-03

INFO OCT-01 EUR-25 ISO-00 EB-11 COME-00 TRSE-00 JUSE-00

FTC-01 CIAE-00 INR-10 NSAE-00 RSC-01 DRC-01 /053 W
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R 281113Z SEP 73

FM AMEMBASSY BONN

TO SECSTATE WASHDC 7691

INFO USMISSION EC BRUSSELS

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E.O. 11652: N/A

TAGS: ETRD, GW

SUBJECT: ANTITRUST CASE U.S. V. IBM

REF: (A) STATE 069913, (B) BONN 11544

1. FOLLOWING IS FURTHER TO OUR RESPONSE CONTAINED REFTEL
B. QUESTION POSED IN PARA 8, REFTEL A, IS WHETHER IBM
DEUTSCHLAND, GMBH COULD BE SUED IN THE FRG FOR DAMAGES ON
THE BASIS OF A US COURT FINDING THAT IT HAS MONOPOLIZED
THE INDUSTRY. PURSUANT TO THIS QUESTION, EMBOFF CONTACT-
ED COGNIZANT FRG ECONOMICS MINISTRY OFFICIAL. IBM'S NAME
WAS NOT MENTIONED. WHILE RELUCTANT TO ANSWER A COMPLEX
QUESTION WITH A SHORT ANSWER, MINISTRY OFFICIAL PROVIDED
INFORMATION BELOW, WHICH MAY BE MADE PART OF THE PUBLIC
RECORD, BUT WITHOUT ATTRIBUTION.

2. THE FRG ANTI-CARTEL LAW MAKES PROVISION FOR LIABILITY
TO COMPENSATE A COMPETITOR FOR DAMAGE SUSTAINED BY REASON
OF THE WILLFUL OR NEGLIGENT VIOLATION OF THAT LAW. IN A
CIVIL PROCEEDING IN WHICH THE PLAINTIFF ALLEGES THAT HE
HAS SUSTAINED DAMAGE FROM THE BUSINESS PRACTICES OF THE
DEFENDANT, THE FRG COURT WOULD PROBABLY CHECK (IF NO
RELEVANT FRG CONVICTION IS ON THE RECORD) AS TO WHETHER
THE FEDERAL CARTEL OFFICE (FCO) IS CONDUCTING ANY INVESTI-
GATION OF THOSE BUSINESS PRACTICES OF THE DEFENDANT

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RELEVANT TO THE CIVIL DAMAGE ACTION. IF NO SUCH INVESTI-

GATION IS UNDERWAY, THE COURT WOULD CONSIDER THE CHARGES IN LIGHT OF THE ANTI-CARTEL LAW. HOWEVER, THE PLAINTIFF WOULD NOT HAVE THE BENEFIT OF THE INVESTIGATIVE CAPACITY OF THE FCO AND WOULD HIMSELF NEED TO MEET THE SUBSTANTIAL BURDEN OF PROVING A VIOLATION OF FRG CARTEL LAW. ON THE OTHER HAND, IF THE FCO WERE CONDUCTING AN INVESTIGATION OF THE DEFENDANT, THE PLAINTIFF WOULD IN ALL PROBABILITY BE INCLINED TO DEFER BRINGING HIS ACTION UNTIL THE INVESTIGATION HAD BEEN COMPLETED BECAUSE OF THE POSSIBILITY THAT THE RESULTS COULD LEAD TO A PROSECUTION AND CONVICTION. THE LATTER WOULD RELIEVE THE PLAINTIFF OF THE BURDEN OF PROVING A VIOLATION OF THE LAW AND LEAVE HIM ONLY THE NEED TO PROVE INJURY AS A RESULT OF THE DEFENDANT'S PROHIBITED ACTIVITIES, FOR WHICH PLAINTIFF SHOULD THEREFORE BE COMPENSATED.

3. A US COURT'S FINDING IN CIVIL OR CRIMINAL ANTITRUST LITIGATION THAT A US FIRM HAD VIOLATED US ANTITRUST LAWS WOULD NOT REPEAT NOT IN AND OF ITSELF CONSTITUTE A BASIS IN THE FRG FOR A CIVIL CLAIM AGAINST THAT FIRM FOR DAMAGES. THE US COURT'S DECISION WOULD NOT IN ITSELF BE ACCORDED EXTRATERRITORIAL EFFECT EVEN FOR THE LIMITED PURPOSE OF ESTABLISHING FACTS RELEVANT TO A FRG CIVIL PROCEEDING. A FRG COURT HANDLING SUCH A PROCEEDING WOULD NEED TO EXPLORE WHETHER THE FRG ANTI-CARTEL LAW WAS VIOLATED BY THE ACTS FOUND TO HAVE VIOLATED US LAWS OR BY ADDITIONAL ACTS. HOWEVER, SOME OF THE EVIDENCE ADDUCED AT THE US TRIAL AND THE FACTS ON WHICH ANY CONVICTION IS BASED COULD CONSTITUTE FAIRLY PERSUASIVE EVIDENCE IN THE EYES OF AN FRG COURT IN AN ACTION FOR CIVIL DAMAGES UNDER THE FRG ANTI-CARTEL LAW. THE FACTS ADDUCED OR PROVED IN A US ANTI-TRUST ACTION COULD ALSO FORM A DEPARTURE POINT FOR AN FCO INVESTIGATION OR COULD SUPPORT FINDINGS ALREADY REACHED BY THE FCO, THUS ULTIMATELY HAVING AN EFFECT ON THE DECISION WHETHER TO PROSECUTE AN FRG SUBSIDIARY OF THE US DEFENDANT FIRM FOR VIOLATIONS OF THE FRG ANTI-CARTEL LAW.

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Message Attributes

Automatic Decaptoning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: CUSTOMS DUTIES, TRADE COMPLAINTS, COMPUTERS, TRADE CONTROLS
Control Number: n/a
Copy: SINGLE
Draft Date: 28 SEP 1973
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: morefirh
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1973BONN14044
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: n/a
From: BONN
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1973/newtext/t1973094/aaaaacwe.tel
Line Count: 98
Locator: TEXT ON-LINE
Office: ACTION L
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 2
Previous Channel Indicators:
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: (A) STATE 069913, (B) BONN 11544
Review Action: RELEASED, APPROVED
Review Authority: morefirh
Review Comment: n/a
Review Content Flags:
Review Date: 31 JUL 2001
Review Event:
Review Exemptions: n/a
Review History: RELEASED <31-Jul-2001 by boyleja>; APPROVED <18-Sep-2001 by morefirh>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: ANTITRUST CASE U.S. V. IBM
TAGS: ETRD, GE
To: STATE
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005